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QUESTIONS AND ANSWERS ON JURISPRUDENCE I

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QUESTION ONE

What is jurisprudence? Attempt the classification of jurisprudential thoughts and what are the problems associated with its classification?

An Attempt

Introduction: Controversy surrounds not only the acceptability of the many attempts made to define jurisprudence; the very possibility of producing a precise definition is challenged, as is the validity of the defining process.

There is no universal or uniform definition of Jurisprudence since people have different ideologies and notions throughout the world. It is a very vast subject. The English word is based on the Latin maxim **jurisprudentia**: **juris** is the genitive form of **jus** meaning law, and **prudentia** means prudence or knowledge. The word is first attested in English in 1628, at a time when the word prudence had the meaning of knowledge of or skill in a matter. The word may have come via the French jurisprudence, which is attested earlier. Hence jurisprudence is the knowledge or skills of the law

Utopian: The knowledge of things divine and human, the knowledge of the just and unjust'

Allen: "scientific synthesis of the law's essential principles.'

Fitzgerald: The name given to a certain type of investigation into law, an investigation of an abstract, general and theoretical nature, which seeks to lay bare the essential principles of law and legal systems.'

Jolowicz: 'A general theoretical discussion about law and it's principles, as opposed to the study of actual rules of law.'

Stone: 'The lawyer's examination of the precepts, ideals and techniques of the law in the light derived from present knowledge in disciplines other than the law.'

Schumpeter: 'The sum total of the techniques of legal reasoning and of the general principles to be applied to individual cases.'

Holmes: 'Jurisprudence, as I look at it, is simply law in its most generalized part. Every effort to reduce a case to a rule is an effort of jurisprudence, although the name as used in English is confined to the broadest rules and most fundamental conceptions.'

Cross 'The study of a lawyer's fundamental assumptions.'

Llewellyn: 'Jurisprudence means to me any careful and sustained thinking about any phase of things legal, if the thinking seeks to reach beyond the practical solution of an immediate problem in hand. Jurisprudence thus includes any type at all of honest and thoughtful generalization in the field of the legal.'

Keeton considered jurisprudence as the study and systematic arrangement of the general principles of law. According to him, Jurisprudence deals with the distinction between Public and Private Laws and considers the contents of principle departments of law.

Roscoe Pound described jurisprudence as the science of law using the term 'law' in juridical sense as denoting the body of principles recognized or enforced by public and regular tribunals in the administration of justice.

Holland defined jurisprudence as the formal science of positive laws. It is an analytical science rather than a material science. Positive law means the general rule of external human action enforced by a sovereign political authority. Jurisprudence is a science because it is a systematized and properly co-ordinated knowledge of the subject of intellectual enquiry.

Jurisprudence as science

Some definitions of jurisprudence (see, eg, that of Allen) suggest that it possesses some of the characteristics of a science. It may claim a place in the social sciences, i.e, those 'inexact areas' of knowledge based on the study of aspects of social organizations and the interrelationships of individuals. The collection and systematization of facts, the deduction of general principles from data concerning legal systems, may suggest that jurisprudence is a methodical study of an aspect of society and maybe classed, therefore, as a social science. But the pretensions of some jurists, implying the right of jurisprudence to be classed as an exact science are difficult to support.

It is doubtful whether jurisprudence can be classified as a science: scientific method is rarely used in jurisprudential investigation; few universal, verifiable principles have emerged from jurisprudence. **Loevinger reminds us:** 'The unanswerable questions of life belong to the realm of philosophy, and jurisprudence is the philosophy of law.'

Classification of jurisprudential thoughts

Attempts have been made to categorize the wide variety of theories of jurisprudence. **Jurisprudence could be divided into three fundamental branches:** '**analytical'** (essentially, an investigation of the law's first principles); '**historical'** (involving the origin and development of the law and legal concepts); '**ethical'** (concerning the theory of justice in relation to law).

Historical Jurisprudence

Historical Jurisprudence gives the answers of the questions, origin of law, the development of law, evolution of law and philosophy of law. It constitutes the general portion of legal history. It deals with the general principles governing the origin and development of law as also the origin development of legal conceptions and principles found in the philosophy of law. Historical jurisprudence has value on the catalogue the development of law and allotting to each phase its true position in the completed narrative. It indicates the processes of change, and is therefore descriptive. It is the function of historical jurisprudence to interpret these changes and to expose the forces which have brought them about.

Ethical Jurisprudence

The branch of jurisprudence deals with basic principles of ethics and moral values. Ethical jurisprudence is a branch of legal philosophy which approaches the law from the viewpoint of its ethical significance and adequacy. It deals with the law as it ought to be an ideal state.

This area of study brings together moral and legal philosophy. It is connected with the purpose of which the law exists and the manner in which such purpose is fulfilled. Salmond observes that ethical jurisprudence is the meeting point and common ground of moral and legal philosophy of ethics in jurisprudence. Ethical jurisprudence has for as its object the conception of justice, the relation between law and justice.

Sociological Jurisprudence

Sociology is the study of men in society. A sociologist considers law as a social phenomenon. The object of sociological jurisprudence is to work upon jurisprudence with reference to the adjustment of relations of ordering of conduct which is involved in group life.

A theme of this branch is to study living law in the same manner as a psychologist studies living issue. The most important branch of legal sociology is penology, which studies the causes of crimes, behavior of criminal and effect of different theories of punishment. The only principle in penology is to find out why a man does wrong to make it not worth his while.

Analytical jurisprudence

The branch of jurisprudence gives analysis to basic principles of civil and their interpretation. The purpose of this branch of study is to analyze and dissect the law of the land as it exists today. This analysis as the principles of the law is done without reference to their historical origin or their ethical significance. Analytical jurisprudence it examines the relations of civil law with other forms of law, analysis the various constituent ideas of which the complex idea of the law is made up.

The problem of classification

Classification in relation to jurisprudence is neither easy nor exact. The following problems have arisen.

'Arrangement is not classification, although classification is arrangement; the difference being that while arrangement may be empirical, classification must be in accordance with some principle': De Witt Andrews ('The Classification of Law' in Readings in Jurisprudence, ed Hall (1938)). It is not easy to discover an appropriate principle: classifications based upon historical context or methodology, for example, are rarely satisfactory and tend to be little more than arrangements of legal authors and their ideas.

The problem of overlap is considerable: Some schools of thought overlap, and a rigid compartmentalization of 'schools of jurisprudence' may perpetuate perceptions of sharp divisions where, in reality, none exists.

Conversely, dissimilar types of our is prudential speculation may be brought together under one heading, suggesting a unity of thought where none exists; thus, it is not easy to perceive similarities between the thoughts of Savigny and Maine as for example.

It is virtually impossible to place some jurists in any of the 'standard schools' of jurisprudence. Thus, the contemporary American jurist, Dworkin, appears to be in a category of his own. How may we categorize Fuller, a self-proponent of natural law, who rejects many aspects of thought associated with that doctrine?.

QUESTION TWO

Assess the scope and relevancy of jurisprudence in our contemporary society

Scope of Jurisprudence

An Attempt

Essentially, there is no unanimity of opinion regarding the scope of jurisprudence. Different authorities attribute different meanings and varying premises to law and that causes difference opinions with regard to the exact limit of the field covered by jurisprudence.

Jurisprudence has been so defined as to cover moral and religious precepts also and that has created confusion. It goes to the credit to Austin that he distinguished law from morality and theology and restricted the term to the body of the rules set and enforced by the sovereign or supreme law making authority within the realm.

Thus the scope of jurisprudence was limited to the study of the concepts of positive law and ethics and theology fall outside the province of jurisprudence.

Jurisprudence involves the study of general theoretical questions about the nature of laws and legal systems, about relationship of law to justice and morality and about the social nature of law.

All in all jurisprudence includes all concepts of human order and human conduct in state and society. Anything that concerns order in the state and society falls under the domain jurisprudence.

Relevance of Jurisprudence

This subject has its own intrinsic interest and value because this is a subject of serious scholarship and research; researchers in Jurisprudence contribute to the development of society by having repercussions in the whole legal, political and social school of thoughts.

One of the tasks of this subject is to construct and elucidate concepts serving to render the complexities of law more manageable and more rational. It is the belief of this subject that the theory can help to improve practice. Jurisprudence also has an educational value.

It helps in the logical analysis of the legal concepts and it sharpens the logical techniques of the lawyer.

The study of jurisprudence helps to combat the lawyer's occupational view of formalism which leads to excessive concentration on legal rules for their own sake and disregard of the social function of the law.

The study of jurisprudence helps to put law in its proper context by considering the needs of the society and by taking note of the advances in related and relevant disciplines.

Jurisprudence can teach the people to look if not forward, at least sideways and around them and realize that answers to a new legal problem must be found by a consideration of present social needs and not in the wisdom of the past.

Jurisprudence is the eye of law and the grammar of law because it throws light on basic ideas and fundamental principles of law. Therefore, by understanding the nature of law, its concepts and distinctions, a lawyer can find out the actual rule of law.

It also helps in knowing the language, grammar, the basis of treatment and assumptions upon which the subject rests. Therefore, some logical training is necessary for a lawyer which he can find from the study of Jurisprudence.

It trains the critical faculties of the mind of the students so that they can dictate fallacies and use accurate legal terminology and expression.

It helps a lawyer in his practical work. A lawyer always has to tackle new problems every day. This he can handle through his knowledge of Jurisprudence which trains his mind to find alternative legal channels of thought.

Jurisprudence helps the judges and lawyers in ascertaining the true meaning of the laws passed by the legislators by providing the rules of interpretation.

Therefore, the study of jurisprudence should not be confined to the study of positive laws but also must include normative study i.e. that study should deal with the improvement of law in the context of prevailing socio-economic and political philosophies of time, place and circumstances.

QUESTION THREE

1. Explain the nature and value of Jurisprudence.

2. 'Jurisprudence is the precipitation of values and articulation of the needs of ages and eras'– analyze and examine.

3. It is said that the word 'Jurisprudence' has meant many different things at different times. State your views on this matter.

An Attempt

Introduction: The word 'Jurisprudence' has been derived from the Latin word **'jurisprudentia',** which in its widest sense means 'knowledge of law'. The Latin word **'juris'** means law, and **'prudentia'** means skill or knowledge. Thus, jurisprudence signifies knowledge of law and its application. In this sense it covers the whole body of legal principles in the world. The history of this concept of law reveals that jurisprudence has assumed different meanings at different times. It is therefore difficult to attempt a singular definition of this term. It has a long history of evolution beginning from the classical Greek period to the 21st century modern jurisprudence with numerous changes in its nature in various stages of its evolution.

Meaning: Jurisprudence in its limited sense means elucidation of the general principles upon which actual rules of law are based. It is concerned with rules of external conduct which persons are constrained to obey. Therefore, etymologically jurisprudence is that science which imparts to us the knowledge about law. 'Law' of course is a term of various connotations, for example there are various branches of law prevalent in a modern State such as contracts, torts, crimes, property etc and in jurisprudence we have to study the basic principles of each of these branches, we're not concerned with detailed rules of these laws.

In yet another sense, jurisprudence may be regarded as the philosophy of law dealing with the nature and function of law. This approach to jurisprudence is receiving primacy in modern times keeping in view the rapid social changes taking place all around the world in recent years. This approach has been termed as 'functional jurisprudence', the thrust being on inter-relationship between law and justice.

Definitions: The term 'jurisprudence' has meant different things at different times. The variation is due to the different methods of inquiry and approach to the study of the subject. Thus though it is impossible to give an exact definition of jurisprudence, several scientists have attempted to explain what they believe is jurisprudence.

Professor Gray has opined that, "jurisprudence is the science of law, the statement and systematic arrangement of the rules followed by the courts and the principals involved in those rules."

Salmond defines jurisprudence as the "Science of the first principles of the civil law."

Scope of Jurisprudence: It is generally believed that the scope of jurisprudence cannot be circumscribed. Broadly speaking, jurisprudence includes all concepts of human order and human conduct in State and society.

Jurisprudence involves certain types of investigation into law; an investigation of an abstract, general and theoretical nature which seeks to lay bare the essential principles of law and legal systems.

Salmond observed, "In jurisprudence we are not concerned to derive rules from authority and apply them to the problem, we are concerned rather to reflect on the nature of legal rules, on the underlying meaning of legal concepts and on the essential feature of the legal system.

Thus, whereas in law we look for the rule relevant to a given situation, in jurisprudence we ask, what is it for a rule to be a legal rule, and what distinguishes law from morality, etiquette and other related phenomenon. Therefore, it can be concluded that jurisprudence comprises of philosophy of law and its object is not to discover new rules but to reflect on the rules already known.

Purpose of Jurisprudence

It is essential for a lawyer, in his practical work, to have knowledge of jurisprudence. Such a study • Serves to train the mind into legal ways of thought • Affords a key to the solution of many provisions of civil law, which would otherwise appear to be singular and unaccountable.

Without such knowledge, no lawyer, however eminent, can really measure the meaning of the assumptions upon which his subject rests.

Uses and Value of Jurisprudence

There is a general confusion about practical utility of jurisprudence as a subject. It is often alleged that jurisprudence being an abstract and theoretical subject, is devoid of any practical utility. However this view is narrow-minded and incorrect. Just as a mathematician investigates number theory not with the aim of seeing his findings put to practical use but by reason of the fascination which it holds for him, likewise the writer on jurisprudence may be impelled to his subject by its intrinsic interest.

Jurisprudence is not without practical value as well. It has been rightly said that Jurisprudence is the 'eye of the law'. It seeks to rationalize the concepts of law, which enable us to solve the different problems involving intricacies of law. In other words, it serves to render the complexities of law more manageable and rationale and in this way it can help improve practice in the field of law.

That apart, jurisprudence also has great educational value. The logical analysis of legal concepts widens the outlook of lawyers and sharpens their logical technique. It helps in rationalizing the thinking of students and prepares them for an upright civil life. It also helps judges and lawyers in ascertaining the true meaning of laws passed by the Legislature by providing the rules of interpretation. It furnishes them with an opportunity to pinpoint the shortcomings and defects in the laws framed by the legislature and improvise them through their judicial interpretation.

Law also has to take note of the needs of society and of the advances in the related and relevant disciplines such as sociology, economics, philosophy etc. It is not the form of law but the social function of law which has relevance in modern jurisprudence.

Conclusion: Jurisprudence deals with law from the philosophical point of view, and is therefore sometimes described as an abstract subject. This is however a misconception. Jurisprudence does have multifarious practical applications inasmuch as it may be said to be the foundation of all branches of law.

QUESTION FOUR

Explain the key features of Utilitarian theory and evaluate the main strengths and weaknesses of the theory

The theory of Utilitarianism takes its name from the Latin word ***Utilis***, meaning '**useful'**. Utilitarianism is a theory created my Jeremy Bentham in the 18th century and further developed by John Stuart Mill in the 19th century. Bentham drew from the roots of Aristotle which gave him a base on what to work on. Bentham wanted a theory which anybody could use and which wasn't dependent on God, this lead him to create this theory based on empiricism (evidence) on the way humans act.

The key idea in Bentham's Utilitarianism is that it's a teleological theory which means that an act is given moral quality once its consequences are analyzed. In this case for an act to be moral it must maximize the pleasure and minimize the pain to the majority of people affected. Bentham used this theory because he believed that people were pain and pleasure organisms that in life we tend to pursue pleasure and free from pain. "Nature has placed us under the governance of two sovereign masters, pain and pleasure." In his opinion what we do naturally is what we ought to do, therefore this natural pursue of pleasure is moral. Pleasure was therefore the summum bonum of this ethical approach meaning it's the one absolute.

Bentham went further to develop this theory by creating the Hedonic Calculus which was a way of measuring how much pleasure is caused by an act. It **had 7 factors, these are; Intensity** (how strong is the pleasure), **Extent** (how many people are affected), **Nearness** (how long until the pleasure will be felt), **Duration** (how long the pleasure will last for), **Certainty** (how certain is it that pain will come), **Fecundity** (producing other pleasures) and **Purity** (producing different pain/pleasures).

Bentham would give each factor a score, for example on the case of "Embryo experimentation on excess IVF". The Extent would be huge because if the experiments work and they find out new information then thousands of people will benefit in the future by being able to have babies when the originally thought they could not.

The Intensity will be huge as it gives them a child, and the child has a life which is would have never had before – pleasure cannot get stronger than this. The Duration would score highly as the new children will have a lifetime of happiness and the parents get to live with a child of their own for many years. However, the Certainty would score quite low because the scientists cannot be certain that pleasures will be

produced and similarly Nearness would score low because one cannot be sure if it will come in 10 years or in 1 year.

People called Bentham's theory Act Utilitarianism which meant that exceptions were allowed to the rule because each situation was different. Rules would start to emerge as each act is likely to produce a similar outcome. For example, when measuring the morality of stealing, 9 times out of 10 stealing would be wrong but one must measure each act anyway as it depends on the consequences of the individual circumstances.

Mill went on to develop Benthams theory and he made three alterations. The **first** alteration was the addition of higher and lower pleasures. He believed that if people continued just to search for pleasures they would tend to choose just lower pleasures because these are easily attainable and it would make Utilitarianism a **"Swine philosophy".**

The higher pleasures were ones of the mind and soul, for example reading, studying and going to the theatre. Whereas the lower pleasures, were pleasures of the body, for example eating, sport and sex. Mill said that if you asked somebody who has experienced both higher and lower pleasures he would say that the higher pleasures are more valuable. He also argued that we should pursue these higher pleasures at the cost of feeling pain. Mill aimed to increase the standard of living so that people were able to feel the higher pleasures such as studying and/or going to the theatre.

Secondly Mill introduced the **"Theory of Justice"**, which benefited the individual. Mill believed that we should not cause pain to the individual just to cause pleasure to the majority. For example, bullying a little boy because it gives pleasure to lots of boys is immoral as it creates a tyranny of majority. Mill said that the individual should have freedom to do as he wishes as long as it does not cause pain to others. For example, torturing a suicide bomber could be moral because this person may kill thousands of people in the future.

Mills final alteration was the introduction of Rule Utilitarianism. Mill said that Bentham's Utilitarianism wasn't practical as one cannot be expected to measure how much pleasure is produced by using the Hedonic Calculus every time! It's just too difficult. Mill's rule utilitarianism meant that after seeing what an act normally produces, and then a rule can be applied. For example, "Adultery" usually causes more pain than pleasure and therefore this makes it immoral to do this. Furthermore, in this type of Utilitarianism there are no exceptions to the rule (unlike Bentham).

Main strengths and weaknesses of the theory

The strengths and weaknesses of Utilitarianism vary between different versions of the theory. The advantages of Act Utilitarianism are not the same as those of Rule; Mill's outlook was very different from that of Bentham. Overall, however, the strengths of both forms are outweighed by their weaknesses. They are not convincing as ethical systems, and some other approach to ethics is required.

An advantage of Bentham's Act Utilitarianism is that it considers the consequences and happiness which result from actions; this seems a sensible approach to ethics which would find much support today. The theory is also flexible and easy to apply; it does not prescribe many hard rules and provides a simple method for decision making. The theory also enables tough decision making through its relativism (*i.e.* it would allow us to sacrifice individuals if it is of great benefit to society).

The problem with Bentham's theory however is that it is truly relativistic, so any conceivable action could be allowed (killing for the sake of pleasure, or ideology). It also enables the suffering of the innocent under a majority, despite obvious injustice. It further allows cruel or sadistic pleasure, since Bentham regarded all pleasure as commensurate (equal), a point noted by the philosopher Bernard Williams.

Mill's theory offers many advantages which get around the problems of Bentham's Act Utilitarianism. By distinguishing between the quality of pleasures, Mill rules out the possibility of sadism or evil pleasure (*e.g.* prison guards enjoying torturing an innocent victim). Also, by offering Rule Utilitarianism, Mill is stating that certain actions are explicitly prohibited because they tend to promote pain. So, he would not allow torture, no matter how much it was enjoyed.

However, Mill's theory lacks the flexibility of Bentham's, which means that sensible rule breaking is no longer possible (an objection pointed out by R.M. Hare). One could not tell white lies, even to protect others. There is a further weakness in Mill's idea of different qualities of pleasure: how can we judge what makes pleasure higher or lower? Surely this is a subjective matter, as taste varies from person to person. It might also be argued that the concept of a competent judge is vague, since it is not clear whether we can really identify such people in today's society.

Overall, the theories put forward by Bentham and Mill fail to provide a convincing or useful approach to ethics. On the one hand, Bentham's views are strikingly relativistic, allowing any pleasure (even sadism). On the other hand, Mill's Rule system lacks the flexibility to make sensible choices in difficult situations. It may be that some other and more modern version of the theory can overcome these problems, such as Welfare Utilitarianism (as supported by Peter Singer) or Two Rule Utilitarianism (as suggested by R.M. Hare).

QUESTION FIVE

What is Natural Law? State the utility of Natural Law in this century.

An Attempt

Introduction: The natural law philosophy has occupied an important place in the realm of politics. The natural law theory reflects a perpetual quest for absolute justice. The roots of this theory are found in the philosophies of ancient Greek philosophers. Socrates, Plato and Aristotle accepted that the postulates of reason have a universal force and men are endowed with reason irrespective of race or nationality.

In ancient societies, natural law was believed to have divine origin. During the medieval period it had religious and super-natural basis, but in modern times it has a strong political and legal mooring. It has been rightly pointed out by Lord Lloyd that natural law has been devised as a mere law of self-preservation or a law restraining people to a certain behavior. It has found expression in modern legal systems in the form of socio-economic justice. The entire human rights philosophy is an outcome of the growing importance of the principles of natural justice. The natural law theory acts as a catalyst to boost social transformation thus saving the society from stagnation.

Meaning: There is no unanimity about the definition and exact meaning of natural law and the term 'natural law theory' has been interpreted differently in different times depending on the needs of the developing legal thought. But the greatest attribute of the natural law theory is its adaptability to meet new challenges of the transient society.

The exponents of natural law philosophy conceive that it is a law, which is inherent in the nature of man and is independent of conventions, legislation or any other institutional device.

From the jurisprudential point of view, natural law means those rules and principles, which are supposed to have originated from some supreme source other than any political or worldly authority.

Some thinkers believe that these rules have a divine origin; some find their source in nature while others hold that they are the product of reason. Even the modern sociological jurists and

realists have sought recourse to natural law to support their sociological ideology and the concept of law as a means to reconcile the conflicting interests of individuals in the society.

Main Characteristics of Natural Law

The phrase **'natural law'** has a flexible meaning and has been interpreted to mean different things in the course of its evolutionary history. However, it has generally been considered as an ideal source of law with its invariant contents. The chief characteristic features of natural law are;-

1. It is a priori method as opposed to an empirical method. A priori method accepts things or conclusions in relation to a subject as they are without any enquiry or observation. Whereas an empirical or a posteriori approach tries to find out the causes and reasons in relation to subject matter

2. It symbolizes physical law of nature based on moral ideals, which has universal applicability at all places and times.

3. It has often been used either to defend a change or to maintain status quo according to the needs and requirements of the time. For example, Locke used the natural law theory as an instrument of change, but Hobbes used it to maintain status quo in the society.

4. The concept of 'Rule of Law' in England and India and 'due processes in USA are essentially based on the natural law philosophy.

Natural Law as distinguished from other Laws

The natural law, by its very nature and contents differs from other laws.

• Natural law is eternal and unalterable, but the other forms of law are subject to periodic changes and alterations.

• Natural law is not made by man; it is only discovered by him. Whereas the other laws are created, evolved, modified and altered by man.

• Natural law is not enforced by any external agency, but every other form of law is enforced by the State or sovereign and there is always a coercive force behind it.

• Natural law is not promulgated by legislation. It is an outcome of preaching of philosophers, prophets, saints and thus in a sense it is a higher form of law to which all forms of man-made laws should pay due obedience.

• Unlike other forms of law, natural law has no formal written Code, nor a precise penalty for its violation or specific reward for abiding by its rules.

• Natural law has an eternal lasting value, which is immutable.

• The central idea behind natural law is that it embodies moral principles which depend on the nature of the Universe and which can be discovered by natural reason. But human law can only be said to be law in so far as it conforms to those principles.

Critical Appraisal of Natural Law Theory

A brief survey of the Natural law theory reveals that the concept has been used to support different ideologies from time to time. It has been used to support absolutism, individualism and has even been used by revolutionists to overthrow the government. The natural law principles of justice, morality and conscience have been embodied in the various legal systems. Natural law being regulated by the law of nature is inevitable and obligatory whereas man-made positive laws are arbitrary and contingent. Natural law is not variable since it emanates from 'human reasoning', which is known for its uniformity and general acceptance.

The part played by the natural law in the development of modern law can hardly be exaggerated. Legal history testifies that it is natural law, which directly or indirectly provided a model for the first man-made law. Oppenheim recognized the contribution of natural law and observed, "but for the system of the law of nature and doctrines of its prophets, modern constitutional law and the law of nations would not have been what they are today.

Criticism of the Natural Law Theory

Despite the merits of the Natural law theory it has been criticized for its weaknesses on the following grounds

1. The moral proposition i.e. 'ought to be', may not always necessarily conform to the needs of the society. For instance, it is natural for men to beget children. However due to growing

population some countries may impose certain restrictions. Therefore giving birth to children may be a natural phenomenon but it may not always be considered as obligatory moral duty of men to conform to this conduct.

2. The concept of morality is a varying contingent changing from place to place; therefore it would be futile to think of universal applicability of law. For example, one society may adhere to monogamy, while another may permit plurality of marriages.

3. The rules of morality embodied in Natural law are not amenable to changes but the legal rules do need to change with the changing needs of society.

4. Legal disputes may be settled by law courts, but the disputes relating to the morality and law of nature cannot be subjected to judicial scrutiny. The verdicts passed in such cases can always be questioned.

5. Though apparently law and morality may appear to be in conflict with each other, the fact remains that in order to decide whether a particular law is 'just' or 'unjust' it has to be tested on the basis of the principles of morality.

Conclusion: According to the Natural law theory, there are objective principles, which depend on the essential nature of the universe, and which can be discovered by natural reason. Natural law is very different from positive man made law and though there has been quite a bit of criticism of this doctrine, yet it has been revived to a large extent in the 20th century.

In the words of Dr Friedmann, "The most important and lasting theories of natural law have undoubtedly been inspired by two ideals–of a universal order governing all men and of the inalienable right of the individuals."

QUESTION SIX

'Law is a command of the Sovereign'. Explain this statement of John Austin with criticisms.

An Attempt

Introduction: The numerous criticisms found in the Natural Law theory, acted as a stimulus to find a new and more acceptable theory for law. The Positivist theory of law sought to satisfactorily explain the meaning of law.

Positivism simply means that the law is something that is '**posited'**, that is to say laws are made in accordance with socially accepted rules. The positivist view on law can be seen to cover two broad principles:

• Firstly, that laws may seek to enforce justice and morality, but their success or failure in doing so does not determine their validity. Provided a law is properly formed, in accordance with the rules recognized in the society concerned, it is a valid law, regardless of whether it is just by some other standard

• Secondly, that law is nothing more than a set of rules to provide order and governance of society.

John Austin and Hans Kelson are regarded as legal positivists and the theories put forth by them are regarded as the Positivist theory of Law.

Austin sought to distinguish law by its formal criteria and not by its contents. **He put forth his Austinian Theory of law, also known as the Imperative theory of law.**

John Austin's theory of law is strongly influenced by **Jeremy Bentham**. According to Austin, law is a phenomenon of large societies with a sovereign: a determinate person who has supreme and absolute de facto power – he is obeyed by all but does not similarly obey anyone else. The laws in that society are a subset of the sovereign's commands: general orders that apply to classes of actions and people and that are backed up by threat of force or "**sanction**."

To Austin Law properly so-called is a species of COMMAND characterized with 4 elements: **(1) Command, (2) Sanction, (3) Duty and (4) Sovereignty.**

The three basic points of Austin's theory of law are, that:

• The law is command issued by the un-commanded commander of the sovereign;

• Such commands are backed by sanctions; and

• A sovereign is one who is habitually obeyed.

The sovereign is the most politically powerful person, who is not under the command of any other person. For example an order passed by a policemen or a teacher will not be considered law because there is someone more powerful than both of them.

A point to be noted as well is that only an order meant to be obeyed by all will be considered law. If the sovereign was to order his servant to perform a certain task or order his cook to prepare a certain dish, these orders would not be considered law as they were only meant for a single individual and not the general populace. However an order such as stopping at a red light is meant for all and can thus be considered as law.

The violation of any of these orders will result in a prescribed punishment. As opposed to Natural Theory, Austin proclaimed definite punishments or sanctions for the violation of a law and not just moral punishments. His theory stated that a person shall be punished for breaking the law.

Criticism of Austinian Theory

Criticism by Historical School

Sir Henry Maine, the main exponent of the historical school, has criticized Austin's imperative theory on two grounds;

• **Law is not invariably linked with the sovereign**. In early communities rules which regulated life were derived from immemorial usages and these rules were administered by domestic tribunals in families or village communities. **Therefore the proposition that a sovereign is an essential pre-requisite of law carries no weight.**

• **There are rules of customary law, international law and even constitutional law which are habitually obeyed and yet do not fall within the Austinian definition of law.**

However, **Salmond in his response to Maine's criticism argued that Austin's theory of law as it exists applies to modern mature states.** It does not concern itself with the early societies. The rules referred to by Maine cannot be called law proper; they could at most be called the rules of positive morality and not of civil law. Salmond calls these rules as historical sources from which law is developed, they are not law themselves.

Moral Criticism

Though Salmond rejected the historical criticism, he appreciated the inadequacy of the imperative theory of civil law. He observed ***"It is one sided and inadequate – the product of an incomplete analysis of historical conceptions."*** Salmond's main criticism against the imperative theory is that it disregards the moral and ethical elements in law. The theory ignores the intimate relation between law and justice. Any definition of law without reference to justice is evidently inadequate.

In all fairness to the imperative theory it must be remembered that, as pointed out by Austin, his theory of civil law is only a formal and not a substantive treatment of the law. The question of morality and public opinion are concerned with the law only in the substantive aspect.

Other Criticisms

• In Austin's theory the sovereign has absolute and limitless power. There is no check on the laws a sovereign can pass. Should the sovereign decide to make murdering a man a legal action then, though this is contrary to moral law, by Austin's theory it will still be legal. Absolute power eventually leads to rebellion. In the words of Lord Acton, a famous English historian, ***'Power corrupts and absolute power corrupts absolutely.'*** The people will eventually revolt against an absolute ruler, as can be seen through numerous instances in history.

• **There is no stability of law.** This is a major drawback of Austin's theory. Each time there is a new sovereign a new set of laws may be formulated that are contradictory to the previous laws.

• **The sovereign is not in the purview of his own law.**

• **It is not only the sanctions behind law that have to be considered,** but also other factors like general recognition, public opinion, the will to be governed etc.

• According to Cicero and Kant, law is based on reason. Laws flow from reason and not from the Sovereign, as reasonableness is one of the primary ingredients of law.

Conclusion: According to the Austinian Theory of law, civil law consists of general commands issued by the State to its subjects and enforced through the agency of Courts of law by the sanctions of physical force. However, one cannot accept Austin's theory on the grounds of the criticism leveled against it by several jurists. But in the end, from a formal point of view, Austin's theory is on the whole forceful and the various criticism considered do not shake it off its foundation.

Who is John Austin?

John Austin was born. March 3, 1790. He was an English jurist whose writings, especially ***The Province of Jurisprudence Determined (1832),*** advocated a definition of law as a species of command and sought to distinguish positive law from morality. He had little influence during his lifetime outside the circle of Utilitarian supporters of Jeremy Bentham.

Austin began to study law in 1812 after five years in the army and from 1818 to 1825 practiced unsuccessfully at the chancery bar. His powers of rigorous analysis and his uncompromising intellectual honesty deeply impressed his contemporaries, and in 1826, when University College, London, was founded, he was appointed its first professor of jurisprudence, a subject that had previously occupied an unimportant place in legal studies. He spent the next two years in Germany studying Roman law and the work of German experts on modern civil law whose ideas of classification and systematic analysis exerted an influence on him second only to that of Bentham. Both Austin and his wife, Sarah, was ardent Utilitarian's, intimate friends of Bentham and of James and John Stuart Mill, and much concerned with legal reform.

Austin's first lectures, in 1828, were attended by many distinguished men, but he failed to attract students and resigned his chair in 1832. In 1834, after delivering a shorter but equally unsuccessful version of his lectures, he abandoned the teaching of jurisprudence. He was appointed to the Criminal Law Commission in 1833 but, finding little support for his opinions, resigned in frustration after signing its first two reports. In 1836 he was appointed a commissioner on the affairs of Malta. The Austins then lived abroad, chiefly in Paris, until 1848, when they settled in Surrey, where Austin died in 1859.

QUESTION SEVEN

Analyze Kelsen pure theory of the law and the criticism levelled against his theory.

An Attempt

Introduction: A connected theory to that of Hart's analysis of law is the theory of the Austrian jurist, Hans Kelsen, the great jurist, who was responsible for the framing of the Austrian Constitution. Kelsen advocated the 'pure' theory of law. He called it pure, because the theory describes only the law, excluding everything that is strictly not law. It seeks to lay down what is the law, and not what the law ought to be.

Kelsen was of the view that, to be acceptable, any theory of law must be 'pure', that is, logically self-supporting, and not dependent on any extraneous factors, i.e. not influenced by factors like natural law or sociological or political or historic influences.

Kelsen considered the systematic character of the legal system to consist in the fact that all its rules or norms are derived from the same basic rule or rules, which he has called '**grundnorms'.** Where there is a written constitution, as in India or the United States, the basic grundnorm will be that the constitution ought to be obeyed. However, where there is no written constitution, as in England, Kelsen postulates that we must look to social behaviour for the grundnorm.

The English legal system, according to him, is based on several such basic rules, such as the theory of parliamentary supremacy, the binding force of precedents, and so on. Such basic rules are very important to any legal system; they are to a legal system what axioms are to geometry; they constitute the initial hypothesis from which all other legal propositions are derived.

Hart's view differs from that of Kelsen's, in as much as Hart refuses to look upon such rules as hypothesis. According to Hart, the basic rules of a legal system do not consist of something, which one has to assume or postulate. Rather, it is itself a rule accepted and observed in a particular society.

According to Hart, although the rule of parliamentary sovereignty in England cannot be derived from any other rule of English law followed in practice and looked upon as a standard, which has to be complied with.

Conclusion: Kelsen considered the systematic character of the legal system to consist in the fact that all its rules or norms are derived from the same basic rule or rules, which he has called '**grundnorms'.**

KELSEN'S PURE THEORY OF LAW IN DETAILS

Introduction

Generally, Law is a system of rules and regulations which are enforced through social institutions to govern human behavior; although the term "**law**" has no universally accepted definition. Laws can be made by legislatures through legislation resulting in statutes, the executive through decrees and regulations, or judges through binding precedents. The formation of laws themselves may be influenced by constitution and the rights encoded therein. The law shapes politics, economics, and society in various ways and serves as a mediator of relations between people.

Legal theorists, hope to obtain a deeper understanding of the nature of law, of legal reasoning, legal systems and of legal institutions. Generally jurisprudence can be broken into categories both by the type of question scholars seek to answer and by the theories of jurisprudence, or schools of thought, regarding how those questions are best answered.

Answers to these questions come from two primary schools of thought:

1. Natural Law 2. Legal Positivism

Legal positivism is a school of thought of philosophy of law and jurisprudence, largely developed by eighteenth and nineteenth-century legal thinkers such as Jeremy Bentham (d. 1832) and John Austin (d. 1859).

According to the Black's Law Dictionary, 'Legal Positivism' is defined as: "Social perspective of a legal rule's validity being authorized by law and socially accepted versus being based on natural or moral law. View of man-made law as posited by man for man, rather than being fair."

In simple words, 'Law' may be promulgated, passed, adopted, or otherwise 'Posited' by an official or entity vested with authority by the Government to prescribe the values and regulations for the community.

Hans Kelsen

Hans Kelsen (d. 1973) was an Austrian jurist, legal philosopher and political philosopher belonging to Legal Positivism school of thought. Roscoe Pound lauded Kelsen as "undoubtedly the leading jurist of the time."

Kelsen is considered one of the pre-eminent jurists of the 20th century and has been highly influential among scholars of jurisprudence and public law, especially in Europe and Latin America although less so in common-law countries. Kelsen was the most influential legal philosopher of the last century. He received 11 honorary doctorates and innumerable awards from all corners of the world.

His book titled "The Pure Theory of Law" was published in two editions, one in Europe in 1934, and a second expanded edition after he had joined the faculty at the University of California at Berkeley in 1960.

"PURE" Theory of Law

In the third paragraph of the opening chapter of his book, Kelsen himself gives the reason for calling his theory as "Pure". He writes: "It is called a 'pure' theory of law, because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly law; its aim is to free the science of law from alien elements. This is the methodological basis of the theory."

Definition of Law

Kelsen defined 'law' in following two headings.

Law: An Order of Human Behaviour: "When we compare the objects that have been designated by the word "law" by different peoples at different times, we see that all these objects turn out to be 'orders of human behavior'."

Law: A Coercive Order: "A second characteristic is that they are 'coercive orders'. This means that they react against certain events, regarded as undesirable because detrimental to society, especially against human behavior of this kind, with a coercive act; that is to say, by inflicting on the responsible individual an evil – such as deprivation of life, health, liberty or economic values

–which if necessary, is imposed upon the affected individual even against his will by the employment of physical force." 3

In simple words, we can say that 'law' according to Kelsen is: "Orders of human behavior that react against certain events, regarded as detrimental against such orders of human behavior, with a coercive act."

Salient Features of Kelsen's Pure Theory of Law

1. **Law as Science:** Kelsen tried to present a theory that could be attempted to convert law into a science, a theory that could be understood through logic.

2. **As a Positive Law:** In the first paragraph of Pure Theory of Law, Kelsen introduces his theory as being a theory of positive law. This theory of positive law is then presented by Kelsen as forming a hierarchy of laws which start from a Basic Norm, i.e. 'Grundnorm' where all other norms are related to each other by either being inferior norms.

3. **Law "As it is":** Kelsen emphasized that analysis must focus on law as 'it is' actually laid down, and not as 'it ought to be'.

4. **Law Contains set of Rules:** Kelsen emphasized that the Law contains mass of rules, and a theory should organize them in an ordered pattern.

5. **Law and Morality:** Kelsen's strict separation of law and morality is an integral part of his presentation of the Pure Theory of Law. The application of the law, in order to be protected from moral influence or political influence, needed to be safeguarded by its separation from the sphere of conventional moral influence or political influence. Kelsen did not deny that moral discussion was still possible and even to be encouraged in the sociological domain of inter-subjective activity. However, the Pure Theory of Law was not to be subject to such influences.

6. **Theory of Law should be Uniform:** According to Kelsen, the theory of law should be applicable at all times and all places.

7. **Law is 'Ought' Proposition:** A norm is a proposition or an if statement: "If A happens, then B is ought to happen." Thus: "If someone commits a theft, the judge ought to punish him." A legal system is composed of series of such norms.

8. **Static Aspect of Law:** Kelsen distinguished the static theory of law from the dynamic theory of law. The static theory of law represented the law as a hierarchy of laws where the individual laws were related the one to the other as either being inferior, the one to the other, or superior with respect to each other.

9. **Dynamic State of Law:** Kelsen discussed the dynamic theory of law. In the dynamic theory of law, the static theory of law comes into direct contact with the governmental administration of the state which must recognize the function of the legislature in the writing of new law. At the same time there is also the understanding of law as being affected by the accumulated standing law which represents the decisions of the courts which in principle become part of the hierarchical representation of the pure theory of law. Importantly, Kelsen allows for the legislative process to recognize the law as the product of political and ethical debate which is the product of the activity of the legislature before it becomes part of the domain of the static theory of law.

Basic Core of Kelsen's Theory-"The Grundnorm"

The law according to Kelsen is a system of norms. He maintained that legal norms are created by acts of will or in other words, products of deliberate human action, as opposed to moral norms which is by God. In relation to this, the pure law theory takes only into consideration only the norms created by the acts of human beings, not norms which come from other superhuman authorities.

Central to the Pure Theory of Law is the notion of a "basic norm" – The Grundnorm — a hypothetical norm, presupposed by the jurist, from which in a hierarchy all 'lower' norms in a legal system, beginning with constitutional law, are understood to derive their authority or 'bindingness'. In this way, Kelsen contends, the bindingness of legal norms, their specifically 'legal' character, can be best understood without it ultimately to some suprahuman source such as God, personified Nature or of great importance in his time — a personified State or Nation.

Validation of Norms

According to Kelsen, there must be some Norm, that validates all other norms, and such Norm is to be called as the Grundnorm. He insisted that the grundnorm need not to be same in every legal

system, but some grundnorm will always be there, whether it's the constitution or the will of dictator.

He further argued that there could be more than one grundnorm, like in Britain, there are three grundnorms: statute, precedent and custom. But, the requirement for having more than one grundnorms is that they must not be in conflict with each other.

Meaning and Validation of the Grundnorm

1. "Assumed" Validity of the Grundnorm

According to Kelsen the validity of the grundnorm is not based upon some other norm behind it, rather its validity is to be 'assumed'. Thus, one cannot point at some other norm in order to declare the grundnorm as valid.

2. Abidance – A Condition

Kelsen insisted that certain number of people obeying the law is not the reason for the validity of the grundnorm. Rather, certain number of people obeying the law is a condition for the validity of the grundnorm, and thus of other norms of the system.

According to him, a universal adherence is not necessary; rather, all that is necessary is a minimum adherence.

3. Altering the Grundnorm

Kelsen argued that when a grundnorm ceases to attract minimum adherence, it ceases to act as a grundnorm; basis of the legal order and any other proposition which does receive support will replace it. Such a change is called **'Revolution' in Law.**

Criticism levelled against Kelson's pure theory of law

1. Kelsen's theory points out that the Grundnorm is presupposition that the constitution ought to be obeyed. The constitution of a country is a sociological, political document and so the Grundnorm is not pure.

2. Kelsen also pointed out that law should be kept free from morality. A general question should be raised here, whether is it possible to keep law free from morality? Kelsen made emphasis in the effective of law and by this way he indirectly accepted the morality as a part of effectiveness.

3. Kelsen attempted to convert law into a science, a theory that could be understood through logic, but on the other hand he insisted on the validity of the grundnorm to be "assumed", rather than based upon some "logic".

4. Kelsen attempted to locate law and legal norms in a middle realm between absolute moral values and social facts. Hence, the denial of the relevance of moral considerations makes legal science sterile and useless, and the denial of the factual nature of law disconnects it from reality.

Conclusion

Hans Kelsen, one of the most influential legal philosophers of the last century has contributed to the answering of certain fundamental questions about law.

The first of these is the relation of law to theories of what the law should be, on the one hand, and to the institutions, practices and mores of its society, on the other.

The second aspect in Kelsen's theory is that the whole system is interconnected with each other in the form of a hierarchy of norms, and there is a basic norm which stands at the top of this heirarchy called the grundnorm, which is of the highest order, and the validity of this grundnorm is to be 'supposed'. All other norms derive their validity from this grundnorm, and no one can question the validity of this grundnorm.

Another aspect of Kelsen's theory is that it presents us with a dynamic legal order rather than a merely static one. The law tends to be orderly through maintaining consistency between its various parts, through the broadening and simplifying of principles and conceptual compartments and, in short, through tending to become a logical system, a perfect and complete logical system.

QUESTION EIGHT

Critically evaluate H.L.A Hart's ideas regarding law as a system of primary and secondary rules.

An Attempt

Introduction: Different jurists had different opinions and different views of law. One particular view was to analyze law in terms of legal rules. It should be noted that legal rules are imperative or prescriptive, rather than indicative or descriptive. In. other words, legal rules are not concerned with what happens, but with what should be done. The legal rules again differ from commands, because commands order the doing of one particular act, while legal rules deal with general and repeated activity. In this sense, legal rules resemble technical rules or directives for achieving certain results. Thus, for instance, certain rules may provide the mode of preparing a good dish. Legal Rules are more like the rules of a recipe than commands. But the fundamental difference between rules of recipe and legal rules is that the legal rules are not merely an instrument for producing certain kinds of society, but the legal rules and their observations are themselves part of such society.

It has also been pointed out that observing a rule is different from merely acting out of habit. What is done out of mere habit is done without any sense of obligation to do it, while observance of a legal rule is merely external. Internally, it is coupled with an attitude that such external behaviour is obligatory. Therefore, a legal right can be defined as one, which prescribes a code of conduct, which is done with the feeling that such conduct is obligatory. This feeling is not a psychological illusion peculiar to the person observing the rule. A person who has to act according to a rule will also expect others to act according to the rule. This sense of obligation arises neither out of mistake nor out of illusion. .

The above is, in short, Professor Hart's theory of law, as set out in his treatise, The Concept of Law.

Hart's definition of law can be stated as follows: "Law consists of rules which are of broad application and non-optional character, but which are at the same time amenable to formalization, legislation and adjudication."

Hart calls these rules of law primary rules, which would simply impose duties. But the unity among these rules is brought about by secondary rules, which are power-conferring rules. For example, the Indian Penal Code consists of primary rules, while the Constitution of India consists of secondary rules, as it consists of a number of power-conferring rules.

Legal rules, as defined above, must be distinguished from rules of games, clubs, and societies, and moral rules, which are also observed with a sense of obligation. The first difference between moral rules and other rules (including legal rules) is that the latter can be amended and can be subject to adjudication, while morality can be amended by an authoritative body; nor is it susceptible to the process of adjudication.

Secondly, legal rules and moral rules can be distinguished from rules of games, etc. Obedience to legal and moral rules is general in application, while the rules of games are applicable only to a limited number of persons who are playing the game. Again, one could withdraw from the game, the club or the society, while in the case of legal and moral rules, such withdrawal from a State or society is practically impossible.

Comparison of Hart's Analysis and Austin's Theory

Hart's analysis of legal rules is different from the Austinian concept of legal rules. According to Austin, the command of the State is imposed and one is obliged or compelled to obey it. According to Hart, a legal rule is observed because one has a sense of obligation to observe it. Law prescribes, not a command, but a standard of conduct. This standard is adhered to, not only because there is a sense of obligation to adhere to it, but also because there is, an expectation that others have some obligation to adhere to it. Therefore, even a person who cannot be compelled to obey the law is still reckoned as having an obligation to obey. According to this view, law is concerned with obligation rather than coercion.

Conclusion: According to Hart, the basic rules of a legal system do not consist of something which one has to assume or postulate. Rather, it is itself a rule accepted and observed in a particular society.

H.L.A. Hart's The Concept of Law in details

Herbert Lionel Adolphus Hart (1907-92) was a British philosopher who was professor of jurisprudence at the University of Oxford. His most important writings included Causation in the Law (1959, with A.M. Honoré), The Concept of Law (1961), Law, Liberty and Morality (1963), Of Laws in General (1970), and Essays on Bentham (1982).

The Concept of Law (1961) **is an analysis of the relation between law, coercion, and morality, and it is an attempt to clarify the question of whether all laws may be properly conceptualized as coercive orders or as moral commands.**

Hart says that **there is no logically necessary connection between law and coercion or between law and morality.** He explains that to classify all laws as coercive orders or as moral commands is to oversimplify the relation between law, coercion, and morality. He also explains that to conceptualize all laws as coercive orders or as moral commands is to impose a misleading appearance of uniformity on different kinds of laws and on different kinds of social functions which laws may perform.

He argues that to describe all laws as coercive orders is to mischaracterize the purpose and function of some laws and is to misunderstand their content, mode of origin, and range of application.

Laws are rules that may forbid individuals to perform various kinds of actions or that may impose various obligations on individuals. Laws may require individuals to undergo punishment for injuring other individuals. They may also specify how contracts are to be arranged and how official documents are to be created. They may also specify how legislatures are to be assembled and how courts are to function. They may specify how new laws are to be enacted and how old laws are to be changed. They may exert coercive power over individuals by imposing penalties on those individuals who do not comply with various kinds of duties or obligations. However, not all laws may be regarded as coercive orders, because some laws may confer powers or privileges on individuals without imposing duties or obligations on them.

Hart criticizes the concept of law that is formulated by John Austin in The Province of Jurisprudence Determined (1832) and that proposes that all laws are commands of a legally

unlimited sovereign. Austin claims that all laws are coercive orders that impose duties or obligations on individuals. Hart says, however, that laws may differ from the commands of a sovereign, because they may apply to those individuals who enact them and not merely to other individuals. Laws may also differ from coercive orders in that they may not necessarily impose duties or obligations but may instead confer powers or privileges.

Laws that impose duties or obligations on individuals are described by Hart as "primary rules of obligation." In order for a system of primary rules to function effectively, **"secondary rules" may also be necessary in order to provide an authoritative statement of all the primary rules.**

Secondary rules may be necessary in order to allow legislators to make changes in the primary rules if the primary rules are found to be defective or inadequate. Secondary rules may also be necessary in order to enable courts to resolve disputes over the interpretation and application of the primary rules. **The secondary rules of a legal system may thus include 1) rules of recognition, 2) rules of change, and 3) rules of adjudication.**

In order for the primary rules of a legal system to function effectively, the rules must be sufficiently clear and intelligible to be understood by those individuals to whom they apply. If the primary rules are not sufficiently clear or intelligible, then there may be uncertainty about the obligations which have been imposed on individuals.

Vagueness or ambiguity in the secondary rules of a legal system may also cause uncertainty as to whether powers have been conferred on individuals in accordance with statutory requirements or may cause uncertainty as to whether legislators have the authority to change laws. Vagueness or ambiguity in the secondary rules of a legal system may also cause uncertainty as to whether courts have jurisdiction over disputes concerning the interpretation and application of laws.

Primary rules of obligation are not in themselves sufficient to establish a system of laws that can be formally recognized, changed, or adjudicated, says Hart. Primary rules must be combined with secondary rules in order to advance from the pre-legal to the legal stage of determination. **A legal system may thus be established by a union of primary and secondary rules** (although Hart does not claim that this union is the only valid criterion of a legal system or that a legal system must be described in these terms in order to be properly defined).

Hart distinguishes between the "external" and "internal" points of view with respect to how the rules of a legal system may be described or evaluated. The external point of view is that of an observer who does not necessarily have to accept the rules of the legal system. The external observer may be able to evaluate the extent to which the rules of the legal system produce a regular pattern of conduct on the part of individuals to whom the rules apply. The internal point of view, on the other hand, is that of individuals who are governed by the rules of the legal system and who accept these rules as standards of conduct.

The "external" aspect of rules may be evident in the regular pattern of conduct which may occur among a group of individuals. The "internal" aspect of rules distinguishes rules from habits, in that habits may be viewed as regular patterns of conduct but are not usually viewed as standards of conduct. The external aspect of rules may in some cases enable us to predict the conduct of individuals, but we may have to consider the 'internal' aspect of rules in order to interpret or explain the conduct of individuals.

Hart argues that the foundations of a legal system do not consist, as Austin claims, of habits of obedience to a legally unlimited sovereign, but instead consist of adherence to, or acceptance of, an ultimate rule of recognition by which the validity of any primary or secondary rule may be evaluated. If a primary or secondary rule satisfies the criteria which are provided by the ultimate rule of recognition, then that rule is legally valid.

There are two minimum requirements which must be satisfied in order for a legal system to exist: 1) private citizens must generally obey the primary rules of obligation, and **2)** public officials must accept the secondary rules of recognition, change, and adjudication as standards of official conduct. If both of these requirements are not satisfied, then primary rules may only be sufficient to establish a pre-legal form of government.

Moral and legal rules may overlap, because moral and legal obligation may be similar in some situations. However, moral and legal obligation may also differ in some situations. Moral and legal rules may apply to similar aspects of conduct, such as the obligation to be honest and truthful or the obligation to respect the rights of other individuals. However, moral rules cannot always be changed in the same way that legal rules can be changed.

According to Hart, there is no necessary logical connection between the content of law and morality, and that the existence of legal rights and duties may be devoid of any moral justification. Thus, his interpretation of the relation between law and morality differs from that of Ronald Dworkin, who in Law's Empire suggests that every legal action has a moral dimension. Dworkin rejects the concept of law as acceptance of conventional patterns of recognition, and describes law not merely as a descriptive concept but as an interpretive concept which combines jurisprudence and adjudication.

Hart defines legal positivism as the theory that there is no logically necessary connection between law and morality. However, he describes his own viewpoint as a "soft positivism," because he admits that rules of recognition may consider the compatibility or incompatibility of a rule with moral values as a criterion of the rule's legal validity.

Legal positivism may disagree with theories of natural law, which assert that civil laws must be based on moral laws in order for society to be properly governed. Theories of natural law may also assert that there are moral laws which are universal and which are discoverable by reason. Thus, they may fail to recognize the difference between descriptive and prescriptive laws. Laws that describe physical or social phenomena may differ in form and content from laws which prescribe proper moral conduct.

Hart criticizes both formalism and rule-scepticism as methods of evaluating the importance of rules as structural elements of a legal system. Formalism may rely on a rigid adherence to general rules of conduct in order to decide which action should be performed in a particular situation. On the other hand, rule-scepticism may not rely on any general rule of conduct in order to decide which action should be performed in a particular situation. Formalism may produce such inflexibility in the rules of a legal system that the rules are not adaptable to particular cases. Rule-scepticism may produce such uncertainty in the application of the rules of a legal system that every case has to be adjudicated.

International law is described by Hart as problematic, because it may not have all of the elements of a fully-developed legal system. International law may in some cases lack secondary rules of recognition, change, and adjudication. International legislatures may not always have the power to enforce sanctions against nations who disobey international law. International courts

may not always have jurisdiction over legal disputes between nations. International law may be disregarded by some nations who may not face any significant pressure to comply. Nations who comply with international law must still be able to exercise their sovereignty.

In any legal system, there may be cases in which existing laws are vague or indeterminate and that judicial discretion may be necessary in order to clarify existing laws in these cases. Hart also argues that by clarifying vague or indeterminate laws, judges may actually make new laws. He explains that this argument is rejected by Ronald Dworkin, who contends that judicial discretion is not an exercise in making new laws but is a means of determining which legal principles are most consistent with existing laws and which legal principles provide the best justification for existing laws.5

Dworkin says in Law's Empire that legal theory may advance from the "preinterpretive stage" (in which rules of conduct are identified) to the "interpretive stage" (in which the justification for these rules is decided upon) to the "postinterpretive stage" (in which the rules of conduct are reevaluated based on what has been found to justify them).6 A complete legal theory does not merely identify the rules of a legal system, but also interprets and evaluates them. A complete legal theory must consider not only the relation between law and coercion (i.e. the "force" of law), but the relation between law and rightfulness or justifiability (i.e. the "grounds" of law). Thus, Dworkin argues that a complete legal theory must address not only the question of whether the rules of a legal system are justified but the question of whether there are sufficient grounds for coercing individuals to comply with the rules of the system.

CRITICISM ON HART'S CONCEPT OF LAW

1. **Lord Llyod** – Hart's description of a developed legal system in terms of a union of primary and secondary rules is undoubtedly of value as a tool of analysis and he wonders whether too much is not being claimed for the new view of some of the old problems. (Hart is aware – suggest that there other element is LS, i.e. "open texture". Lord Llyod asks the question whether it is possible to reduce all rules of the legal system to rules, which impose duties, and rules, which confer powers.

2. **RONALD DWORKIN** (born in 1931) took chain from HART has criticized HART for representing law as a system of rules and for suggesting that, at certain points, the judges use their discretion and play a legislative role.

THE view of Dworkin is that a conception of law as a system of rules fails to take account of what he calls "principles". He also maintains that judges do not have discretion as even in hard cases, there is only one "right answer"

The contention of **Dworkin** is that principles are not distinguished from rules in a number of ways

1. Principles such as the standard that no man may profit by his own wrong, differ from rules "in character of direction they give."

2. While rules are applicable in all or nothing, **principles** state "a reason that argues in one direction but do not excessitate a particular decision.

To quote him:

> *"All that is meant when we say that a particular principle is a principle of our law, is that the principle is one which officials must take into account, if it is relevant as a consideration inclining in one direction or another."*

Principles have a dimension of **weight** or **importance** which rules do not have.

Dworkin asserts that whilst a system of rules must be inherently consistent and coherent, devoid of inner contradictions; to the contrary principles and policies do tolerate contradictions without necessarily breeding terminal chaos to a legal system.

1. Dworkin's "Rights Thesis of Law" which views the legal system of rules but one encompassing social policies and principles.

2. Dworkin is convinced that the judicial function is to find the "right answer" by assessing rules, principles and polices. Thus the role of the Judge is wider and grander beyond the "false" dichotomy of law vis-à-vis morals which, it is claimed, tends to restrict the judicial function.

QUESTION NINE

Compare and contrast the Natural law theory and Positive law theory

An Attempt

What makes the law legitimate? What is a legitimate source of law? What binds people to obey the law? Is there an essential connection between the law and morality? Can the content of a law disqualify it from being considered a legitimate law, which must be obeyed? This debate has been taken up by two major groups of legal theorists:

Natural law

Natural law theory is a philosophical and legal belief that all humans are governed by basic innate laws, or laws of nature, which are separate and distinct from laws which are legislated.

Natural law's content is set by nature it therefore has validity everywhere .i.e. universal. The laws arise through the use of reason to analyze human nature and deducing binding rules of moral behavior. This theory is built on the idea of perfect law based on equity, fairness, and reason, by which all man-made laws are to be measured and to which they must (as closely as possible) conform.

Natural law theory has heavily influenced the laws and governments of many nations, including England (Magna Carta 1215) and the United States (Declaration of Independence 1776). It has also informed the publications of international legal instruments like the Universal Declaration of Human Rights (1948) and African Charter on Human Rights (1981).

Positive law

Positive law is law made by human beings. Specifically, positive law may be characterized as law actually and specifically enacted or adopted by proper authority for the government of an organized society. A body of man-made laws consisting of codes, regulations, and statutes enacted or imposed within a political entity such as a state or nation.

According to the legal positivists, law is only positive law; that is statute law and such customary laws as recognized by the state. positivism characterizes as law to be applied by the judges, and alone to be considered by jurisprudence, those norms only which are enacted as such by the

factual and published will of the legislative organ in due conformity with constitutional law, or which are explicitly or impliedly admitted by it1.

Positive law sets the standards for acts that are required as well as those that are prohibited and penalties are usually prescribed for violation of positive law. Those who are physically present where the positive laws have governing power are typically required to obey such laws.

The Contrast

Natural Law theorists such as Plato, Aristotle, and St. Thomas Aquinas argue that a **law is only just and legitimate if it promotes the common good.** For **Legal Positivists like John Austin, H.L.A Hart, and Thomas Hobbes, a law is legitimate if it has been enacted through the proper channels by someone with the power to do so regardless of the content of that law.** While each theorist presents his own explanation, each seeks to answer these crucial questions about law and society.

Legitimate laws must come from legitimate sources. **Legal Positivists argue that for the source of law to be legitimate, it must come from a source of power.** For Austin, the source of law must be the only person who the subjects are in the habit of obeying. They must also be willing to back their sanctions and laws with credible force. **Natural Law theorists posit that the source of law is divine or can be discovered and formed according to what is just and will promote the common good.** Aquinas takes the stance that the source of divine law is God. Human laws are derived from these divine laws and practical reason.

Natural Law theorist St. Thomas Aquinas argues that human law is legitimate only if it is in line with divine law and promotes universal happiness. All law is fashioned to the common welfare of men. He posits that neglecting God's law or the universal happiness in the formation of a law makes it unjust. Accordingly, Aquinas advances that an unjust law is not a legitimate law at all and does not have to be obeyed. In stark contrast, **Legal Positivist John Austin contends that legitimate law is nothing more than commands from a sovereign to the people who must obey him backed by credible threats and sanctions.** The law's legitimacy is

1Dworkin, Ronald M., "Lord Devlin and the Enforcement of Morals"(1966). Faculty ScholarshipSeries . Paper 3611' Yale Law School.

completely independent of the morality of its content and must always be obeyed. It draws its validity from the power of the sovereign who is the only ruler that subjects are in the habit of obeying. He argues that the law as it exists is separate from what it ought to be.

Once legitimate sources have created legitimate and just laws, there must be a reason as to why people are compelled to follow or obey them. Natural Law subscribers believe that the ultimate end is the greater good and law is ordered to serve the wellbeing of man. **Good laws should be followed because they follow reason and are inherently valuable and are a means to the ultimate human end.** Additionally, they argue that man was given reason, which distinguishes him from beasts. It is this reason, which allows him to control his actions and impulses to act justly. Acting justly and virtuously leads to the good life and the ultimate happiness. **Opposite these thinkers is Austin. He believes that people are obedient to the letter of the law because if they do not then they will be punished with force.** Fear becomes a motivator for obedience for both Austin and Hobbes.

Summary

Natural law is typically based on moral principles, natural order, and ethical code that people share as human beings. It is inherent and may not require government enforcement. On the other hand positive law is the legal rules that people are typically expected to follow; it is artificial order and consists of rules of conduct that people place upon each other. Legal positivists are of the view that for a law to be valid, it should be codified, or written down, and recognized by some type of government authority. They reject the theory that people will obey inherent law based on moral values. Positivists espouse relativism and subjectivism with respect to what is proper or improper. Natural law opposes the idea that moral law is relative, subjective, and changeable.

QUESTION TEN

Critically examine 'Legal Realism' as expounded by Holmes. Compare his view with that of Salmond.

An attempt

Introduction: One version of legal realism was the one propounded by Samlond, who pointed out that all law, is not made by the legislature. In fact he argued that in England much of it was made by law courts. Nevertheless, all laws, however made, are recognized and administered by the courts. Therefore, if a rule is not recognized by a Court, it is not a rule of law. Thus, according to Salmond, it is the courts and not the legislature that we must turn to if we wish to ascertain the true nature of law. Accordingly, he defined law as the body of principles recognized and applied by the State in the administration of justice, as the rules recognized and acted upon by the Courts.

However, there has been another version of legal realism, particularly in the United States of America. According to this theory propounded by American jurists, law is in reality judge-made. The origin of this theory is traced to Justice Holmes, and the theory has a substantial following in the United States.

Holmes highlights the situation not of the judge or the lawyer, but of what he calls 'the bad man', i.e. the man who is anxious to secure his own selfish interests. Such a man is not interested in knowing what the statutes or the text books say, but what the Courts are likely to do in fact. This theory makes a distinction between law in books and law in action.

According to this theory, what the courts will actually do cannot necessarily be deduced from the rules of law in text books or even from the words of the statutes themselves, since it is for the Courts to say what the words mean. As Gray observed, "The Courts put life into the dead words of the statute." This approach is a reaction to the traditional approach that judges do not really create the law, but only declare what the law already is.

This school fortifies sociological jurisprudence, and recognizes law as the result of social influence and conditions and regards it as based on judicial decisions. In the words of Holmes,

"The life of the law has not been logic; it has been experience." Or as Paton pointed out, "Law is what the Courts do; it is not merely what the Courts say. The emphasis is on action."

However, the American realists point out that when Courts must choose between alternatives, much will depend on the subjective element of a judge. The judicial process, they argue, is not like that of a slot machine. Much will depend on the temperament, upbringing, social background, realities, learning etc of the judge. Therefore, they contend that law is nothing more than the prediction of what the Courts will decide.

It is also argued that the language of several statutes is uncertain and the Courts are therefore called upon to decide what a particular word or phrase means. Thus, for instance, the English Road Traffic Act makes it an offence to drive a vehicle in a manner dangerous to the public. An interesting question brought before the Court was whether a person who steers a broken down vehicle on tow can be said to be driving it.

Since the Parliament and not defined the word 'driving', the word would have to be understood in the ordinary sense. However, the ordinary usage of the word is not wide enough to cope up with such a marginal situation, as it does not draw a very clear or distinct line between what is driving and what is not driving. Faced with this question for the first time in 1946, the Court had to draw such an arbitrary line and further define the term 'driving' in Wallace v. Major.

A note can also be made of Scandinavian Realism, the founder whereof was Axel Hagerstrom. Whilst the American realists preferred to revolve around what the Courts did and what the judges said, the Scandinavian School sought to develop a formal philosophy of law, showing how law is not an inextricable part of society as a whole. The Scandinavian Realist does not look at law as a divine command. According to them, law creates morality and not the other way around.

Criticism

The view that a statement of law is nothing more than a prediction of what the Courts will decide is subject to certain criticism.

Legal situations are not predictions

It should be noted that a statement of law is seldom treated as a prediction, which a counsel submits before a Court. He is not forecasting what the judge will decide, but he is asking what the judge should decide. Further, a judicial decision is not a prediction of what the higher Courts would do, but it is a judgment as to what the law now is. Similarly, a legislature is not predicting what will be done, but it lays down what shall be done.

The theory represents a fraction of the situation

Though the realist view may be true to some extent in those situations when a new principle of law is evolved, yet it should be noted that most of our law is settled and stabilized. It should also be noted that several points of law never reach the Court, for the simple reason that the principle of law is so clear that the parties adhere to it.

Thus, it is argued that the creative days of the judge is now a thing of the past. It is argued that today the law is so complete that the task of the judges is the more or less automatic task of applying settled laws to the cases before them.

However, this criticism is not without an answer. Legal rules are still not as certain as was once imagined and the element of choice still faces a Court of law. To quote one example, in England the unlawful and intentional killing of a human being is the common law crime of murder. But what would be the position if X intentionally inflicts a mortal wound on Y, and then, mistakenly thinking him to de dead, throws the body into a lake, with the result that Y dies, not from the wound but from drowning? Would this amount to murder? Until 1954, the English law had no answer to this question, when these facts were before the Court in Thabo Meli v. R, in which case the Court had to further develop the English law of murder.

The theory of uncertainty of language is not always correct

It may be noted that in some border-line cases, the language may be uncertain, as in the example of the word ‘driving’ given earlier. But to generalize that all language is uncertain is to exaggerate the situation without foundation. In marginal cases, the meaning of the word may be uncertain, but this proves that the meaning of the word is certain in other cases. Therefore, the

realistic approach of law based on the uncertainty of language is a generalization of an exceptional situation.

Conclusion: The origin of the theory of Legal Realism can be traced to Justice Holmes. The theory propounds that it is the courts and not the legislature that we must turn to if we wish to ascertain the true nature of law. The theory works on the belief that **"the Courts put life into the dead words of the statute."** However, there has been some criticism of this theory.

QUESTION ELEVEN

1. Enumerate and discuss the three developmental stages that a society is destined to experience.
2. Maine's categorization of societies into static and progressive societies is more apparent than real. Discuss
3. Law is a Development of the Popular Consciousness of a People. Discuss
4. What is the relevance of Historical school of jurisprudence to legal studies in Tanzania?.

An attempt

The historical school of jurisprudence manifests the belief that history is the foundation of the knowledge of contemporary era. Two jurists who researched extensively in this area **– Friedrich Carl Von Savigny (1799-1861) and Sir Henry Maine (1822-1888)** will be the subject of examination in this section.

History is a record of past events. As man has a past so does law. The importance of historical school of jurisprudence cannot be overemphasized. **Apart from standing in opposition to the natural law school, the historical school is unique for its emphasis of the relevance of generations past to the present and the future.**

The Two Prime Reasons for the Evolution of Historical School:

1. It came as a reaction against natural law, which relied on reason as the basis of law and believed that certain principles of universal application can be rationally derived without taking into consideration social, historical and other factors.

2. It also came as a reaction against analytical positivism which constructed a soul-less barren sovereign-made-coercive law devoid of moral and cultural values described by Prof. Hart as "gun-men-situation".

The Basic Tenets of Historical School can be Summarized as follows:

1. Historical jurisprudence is marked by judges who consider history, tradition, and custom when deciding a legal dispute.
2. It views law as a legacy of the past and product of customs, traditions and beliefs prevalent in different communities.

3. It views law as a biological growth, an evolutionary phenomena and not an arbitrary, fanciful and artificial creation.

4. Law is not an abstract set of rules imposed on society but has deep root in social and economic factors and the attitudes of its past and present members of the society.

5. The essence of law is the acceptance, regulation and observance by the members of the society.

6. Law derives its legitimacy and authority from standards that have withstood the test of time.

7. The law is grounded in a form of popular consciousness called the Volksgeist.

8. Law develops with society and dies with society.

9. Custom is the most important source of law.

History can play dual roles in law practice and judicial decision-making

First Role: One role emerges through the legal doctrine of stare decisis, a key component in a common law system. It requires a court to consider and follow previous decided cases (precedents) that sufficiently resemble an instant or current case. As it is sometimes phrased, courts should treat like cases alike. Stare decisis therefore requires a court to consider history: the history or tradition of analogous cases. The problem that arises, however, is that the similarity and dissimilarity between a prior case (or precedent) and a current case is almost always disputable.

Second Role: History also sometimes plays a second role in law practice and judicial decision-making. Namely, lawyers and judges sometimes invoke historical arguments to support a particular legal or judicial conclusion. As a general matter, lawyers and judges typically accept certain types or modes of argument as being legitimate within the legal system.

History often plays a prominent role in constitutional law. Attorneys and judges will assert that historical evidence reveals that the framers of a constitutional provision intended to achieve some desire goal.

Basic Concept of Savigny's Volksgeist

Von Savigny, a prominent German jurist through his concept of Volksgeist introduced a new dimension in the legal arena. In fact, his historical school was anchored on the Volksgeist, or 'the spirit of the people'. Savigny, also known as the pioneer of his Historical School of Law through concept of Volksgeist explains the need to understand the interrelationship between law and people. For him, law and people cannot be isolated from each other and this is well explained by Savigny's concept of

Volksgeist. This study aims at analyzing the concept of Volksgeist and the Historical School of Law. It also relates the concept with African customary law.

Volksgeist

Volksgeist (also volksseele, Nationalgeist or Geist der Nation, Volkscharakrer, and in English "national character") is a term connoting the productive principle of a spiritual or psychic character operating in different national entities and manifesting itself in various creations like language, folklore, mores, and legal order.

According to Savigny, the nature of any particular system of law, was the reflection of the "spirit of the people who evolved it." This was later characterized as the volksgeist by Puchta, Savigny's most devoted disciple. Savigny believed that law is the product of the general consciousness of the people and a manifestation of their spirit. The basis of origin of law is to be found in volksgeist which means people's consciousness or will and consists of traditions, habits, practice and beliefs of the people. The concept of volksgeist in German legal science states that law can only be understood as a manifestation of the spirit and consciousness of the German people.

As already mentioned, his theory served as a warning against hasty legislation and introduction of revolutionary abstract ideas on the legal system unless they mustered support of the popular will, volksgeist.

Savigny's central idea was that law is an expression of the people. It doesn't come from deliberate legislation but arises as a gradual development of common consciousness of the nation.

The essence of Savigny's volksgeist was that a nation's legal system is greatly influenced by the historical culture and traditions of the people and growth of law is to be located in their popular acceptance. Since law should always conform to the popular consciousness i.e. Volksgeist, custom not only precedes legislation but is also superior to it.

For him, legal system was a part of culture of a people. Hence, law wasn't the result of an arbitrary act of legislation but developed as a response to the impersonal powers to found in the people's national spirit.

Laws aren't of universal validity or application. Each people develop its own legal habits, as it has peculiar language, manners and constitution. Savigny insists on the parallel between language and law.

Neither is capable of application to other people and countries. The volksgeist manifests itself in the law of people: it is therefore essential to follow up the evolution of the volksgeist by legal research. The view of Savigny was that codification should be preceded by "an organic, progressive, scientific study of the law" by which he meant a historical study of law and reform was to wait for the results of the historians. Savigny felt that "a proper code [of law could only] be an organic system based on the true fundamental principles of the law as they had developed over time".

Savigny's method stated that law is the product of the volksgeist, embodying the whole history of a nation's culture and reflecting inner convictions that are rooted in the society's common experience. The volksgeist drives the law to slowly develop over the course of history. Thus, according to Savigny, a thorough understanding of the history of people is necessary for studying the law accurately.

Criticism:

As already stated, a precise and flawless definition of law is far from reality, and Savigny‟s Volksgeist is no exception. The following are the criticisms of Savigny‟s Volksgeist:

1. Dias maintains that many institutions like slavery have originated not in Volksgeist but in the convenience of a ruling oligarchy.

2. It is not clear who the volk are and whose geist determines the law nor it is clear whether the Volksgeist may have shaped by the law rather than vice-versa.

3. In pluralist societies such as exist in most parts of the world it really seems somewhat irrelevant to use the concept of Volksgeist as the test of validity.

4. Important rules of law sometimes develop as a result of conscious and violent struggle between conflicting interests within the nation and not as a result of imperceptible growth. That applies to the law relating to trade unions and industry.

5. Lord Lloyd also points out that Savigny underrated the significance of legislation for modern society. Sir Henry Maine rightly pointed out that a progressive society has to keep adapting the law to fresh social and economic conditions and legislation has proved in modern times the essential means of attaining that end.

6. Paton states that the creative work of the judge and jurist was treated rather too lightly by Savigny.

7. A survey of the contemporary scene shows that the German Civil Code has been adopted in Japan, the Swiss Code in Turkey and the French Code in Egypt without violence to popular propensity.

8. It was unfortunate that the doctrine of Volksgeist was used by the National Socialist in Germany for an entirely different purpose which led to the passing of brutal laws against the Jews during the regime of Hitler in Germany.

Sir Henry Maine's School of Law (1822-1888)

Maine's deep knowledge of early society resulted in his emphasis on man's deep instincts, emotions and habits in historical development. According to Maine, law can be understood as a late stage in a slow-evolving pattern of growth. He believes that there are three stages in legal development in early societies – law as the personal commands and judgments of patriarchal ruler; law as custom upheld by judgements; and law as code.

"Law" in Tribal Societies

Primitive, tribal societies appear to lack "law" in the form that exists in so-called advanced societies. The absence of the institutions that we normally associate with legal system – courts, law enforcement authorities, prisons, and legal codes led to the conclusion that these communities were governed by custom rather than law.

Three Stages in Legal Development

In the first stage, absolute rulers dominated. It was the age of the divine rights of Kings, where the king could do no wrong. System of ruler ship was absolute and draconian. There were no principles governing governance; only the whim and caprice of the king reigned. Recall Austin's commander, who was above the law, and whose commands must be obeyed by inferiors.

The second stage is heralded by the decline of the power and might of patriarchal rulers (i.e. a small group of people having control of a country or organization). In their place, the oligarchies of political and military rulers emerged. The oligarchies claimed monopoly of control over the institutions of law.

Maine maintains that the judgments of the oligarchies evolved or solidified into the basis of customs. But the customs are largely unwritten, giving interpreters the opportunity to enjoy a monopoly of explanation.

In the third stage, which represents the breaking of the monopoly of explanation, codification characterizes the legal system.

Static and Progressive Societies

Maine further propounded that for the purpose of the development of law, society can be categorized into two: static and progressive society.

Static or stationary societies did not move beyond the concept of code-based law. In this society, reference to the code answered all legal questions. According to Maine, members of the society were lulled into the belief in the certitude of code and were, therefore, unwilling to reform the law.

On the other hand, progressive societies were to be found in Western Europe. These societies were dynamic and amenable to legal reform. They brought about the development and expression of legal institutions.

In the development of law in progressive societies, **Maine identified the characteristic use of three agencies – legal fictions, equity and legislation.** Legal fictions are mere suppositions aimed at achieving justice by overcoming the rigidities of the formal law. According to Maine, legal fictions help to ameliorate the harshness of the law. A classic example he gave was the institution of the Roman fiction of adoption. He called equity a secondary system of law. It claimed a superior sanctity inherent in its principles which exist side by side with the law. In many cases, it could displace the law. Legislation represents the final development of the law. It is an institution through which various laws in the society are reduced into writing or codes.

Miscellany

Maine is known to have commented on "status" and "contract". He said that "the movement of progressive societies has hitherto been a movement from status to contract". In explaining this statement, Maine said that in early times an individual's position in his social group remained fixed; it was imposed, conferred or acquired.

He just stepped into it. He accepted such fate as he found it. He could do nothing about it. Later on, however, there came a time when it was possible for an individual to determine his own destiny through the instrumentality of contract. No longer was anything imposed on him from external forces; he was now in charge: from slavery to serfdom, from status determined at birth, from master-servant relationship to employer – employee contract.

Maine Criticisms

Maine is criticized for oversimplifying the nature and structure of early society for the following reasons:

Early society does not show an invariable pattern of movement from the three-stage development of law – from personal commands and judgments of patriarchal rulers through law as custom upheld by judgments to law as code.

The so-called rigidity of the law has repeatedly be challenged by contemporary anthropologists who are of the opinion that primitive peoples were adaptable and their laws flexible.

Also, there were matriarchal societies just as there were patriarchal societies.

Furthermore, it has been observed that status does not necessarily gravitate to contract. Rather, the opposite development has been possible. For example, social welfare legislation in advanced countries is status-based. In the U.S., "affirmative action", a policy that is predicated on Afro-Americanism, is status-based. Also, in Canada and UK, the status of a single mother is recognized in law.

Conclusion: Although Maine lived up to his historical commitment, he overlooked the dynamics that have characterized societies across ages.

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****Ideas were paraphrased from the above works cited.***